Fauziah bt Ismail & Ors v Lazim bin Kanan & Ors (as person occupying GM 820, Lot 1642, Mukim Kajang, Daerah Hulu Langat, Negeri Selangor Darul Ehsan without the applicants' consent)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(IM)-2779–11 OF 2012

RAMLY ALI, MOHTARUDIN BAKI AND MAH WENG KWAI JJCA

17 APRIL 2013

Land Law — Malay reservations — Dealing contrary to Enactment — Dealing contrary to Malay Reservation Enactment (Chap 142) — Meaning of 'Malay' — Whether sale of Malay Reserve Land to non-Malay or non-citizen of Malaysia prohibited by enactment — Whether sale and purchase agreement ('SPA') for such sale ab initio void and unenforceable — Whether purchaser was Indonesian when SPA signed and did not qualify to be 'Malay' — Whether long period of occupation on Malay Reserve Land could grant entitlement to the land

The appellants were registered owners of a parcel of Malay Reserve Land ('the land') and commenced summary proceedings for possession of the land in the High Court when they found the respondents were in occupation without their consent. In their replies to the originating summons ('OS') filed by the appellants the respondents contended they were in lawful possession of the land and relied upon a sale and purchase agreement ('SPA') executed between the appellants' late father — who was then the land's owner — and the named respondent, Lazim bin Kanan ('Lazim') which evidenced an outright sale of the land to Lazim in consideration for the payment of RM5,000. At the time the SPA was executed Lazim was an Indonesian. He only acquired Malaysian citizenship after the appellants had commenced their court proceedings. When the court ordered the OS to be converted into a writ and the affidavits to be treated as pleadings, the appellants applied under O 14A and/or O 33 of the Rules of the High Court 1980 ('RHC') for the determination of the preliminary question whether Malay Reserve Land could be sold to a non-citizen of Malaysia in order to avert a trial if the answer to that question was in the negative. The court dismissed the application holding that the determination of that question would not resolve the appellants' claim to the land. The court held that as the respondents had shown they were not trespassers and that they had come upon the land with the previous owner's consent and pursuant to a SPA under which consideration was paid, the dispute should go for trial. The appellants appealed to the Court of Appeal against the decision. Before the Court of Appeal the respondents conceded that although Lazim did not fall within the definition of 'Malay' when the SPA was

executed the respondents should be allowed to continue to be in possession of the land as they had been occupying it since 1993.

Held, allowing the appeal and entering judgment in favour of the appellants:

(1) Based on the undisputed relevant facts relating to the preliminary issue posed and the interpretation of the relevant laws and documents in the case, the answer to the question posed by the appellants must be in the negative ie the land, being Malay Reserve Land, could not be sold to a non-Malay or non-citizen. The SPA relied upon by the respondents was void ab initio and unenforceable (see para 32 (b)).

(2) As the relevant undisputed facts were sufficient to determine the question posed by the appellants, the application under O 14A and/or O 33 of the RHC was fit and proper. There was no necessity to go for trial to adduce other evidence as was ordered by the High Court (see paras 32(a) and 21).

(3) At the time the SPA was entered into in 1993, Lazim was not a citizen of Malaysia. He only became a citizen in December 2010. Therefore he could not claim to be 'Malay' for the purpose of the Malay Reservation Enactment. He was not eligible to be one at the material time (see para 23).

(4) Section 2 of the Enactment defined 'Malay' as a person who belonged to any Malayan race and habitually spoke the Malay language or any Malayan language and professed the Muslim religion. The words 'Malayan race' must refer to a race in Malaysia (or Malaya previously). In other words, it must refer to a citizen of the country, but not to a non-citizen (see para 24).

(5) Article 160 of the Federal Constitution defined 'Malay' as a person who professed the religion of Islam, habitually spoke the Malay language, conformed to Malay custom and (a) was before Merdeka Day born in the Federation or in Singapore or born of parents one of whom was born in the Federation or in Singapore, or was on that day domiciled in the Federation or in Singapore; or (b) was the issue of such a person. Lazim, who was born in Indonesia in 1946, did not qualify for the citizenship requirement either under paras (a) or (b) of the definition (see paras 25–26).

(6) Since a non-Malay purchaser could not acquire title to Malay reserved land under the Enactment, there could not be any other way by which such a purchaser could acquire it. A long period of occupation and stay on the land by the respondents could not create any form of entitlement to the land. To allow the purchaser to acquire title by any other means not in accordance with the Enactment would defeat the purpose of the Enactment the aim of which was to safeguard Malay ownership of Malay reservation lands (see paras 30–31).

[Bahasa Malaysia summary

Perayu-perayu adalah pemilik-pemilik berdaftar sebidang Tanah Rizab Melayu ('tanah tersebut') dan telah memulakan prosiding terus untuk milikan tanah tersebut di Mahkamah Tinggi apabila mereka mendapati responden-responden yang menduduki di situ tanpa persetujuan mereka. Dalam jawapan mereka terhadap saman pemula ('SP') yang telah difailkan oleh perayu-perayu, responden-responden berhujah mereka memiliki tanah tersebut dengan sah dan bergantung kepada perjanjian jual beli ('PJB') yang disempurnakan antara arwah bapa perayu-perayu — yang merupakan pemilik tanah tersebut pada masa itu — dan responden yang dinamakan, Lazim bin Kanan ('Lazim') yang membuktikan jualan langsung tanah tersebut kepada Lazim dengan balasan untuk bayaran RM5,000. Pada masa PJB tersebut disempurnakan Lazim merupakan warganegara Indonesia. Dia hanya memperoleh kewarganegaraan Malaysia selepas perayu-perayu telah memulakan prosiding mahkamah mereka. Apabila mahkamah memerintahkan SP diubah kepada writ dan afidavit-afidavit hendaklah dianggap sebagai pliding, perayu-perayu telah memohon di bawah A 14A dan/atau A 33 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk menentukan persoalan awal sama ada Tanah Rizab Melayu boleh dijual kepada bukan warganegara Malaysia bagi tujuan mengelakkan perbicaraan jika jawapan kepada persoalan tersebut adalah negatif. Mahkamah menolak permohonan dengan memutuskan bahawa penentuan persoalan tersebut tidak akan menyelesaikan tuntutan perayu-perayu kepada tanah tersebut. Mahkamah memutuskan bahawa oleh kerana responden-responden telah menunjukkan mereka bukan penceroboh dan bahawa mereka telah menduduki tanah tersebut dengan persetujuan pemilik sebelumnya dan menurut PJB di mana balasan telah dibayar, pertikaian patut dibicarakan. Perayu-perayu telah merayu kepada Mahkamah Rayuan terhadap keputusan itu. Di hadapan Mahkamah Rayuan responden-responden mengakui meskipun Lazim tidak terjatuh dalam definisi 'melayu' apabila PJB itu disempurnakan responden-responden patut dibenarkan untuk meneruskan milikan tanah tersebut kerana mereka telah menghuni di situ sejak 1993.

Diputuskan, membenarkan rayuan dan memasuki penghakiman menyebelahi perayu-perayu:

(1) Berdasarkan fakta relevan yang tidak dipertikaikan berkaitan isu awal yang dikemukakan dan pentafsiran undang-undang relevan dan dokumen-dokumen dalam kes itu, jawapan kepada persoalan yang dikemukakan oleh perayu-perayu mestilah negatif iaitu tanah tersebut, yang merupakan Tanah Rizab Melayu, tidak boleh dijual kepada bukan Melayu atau bukan warganegara. PJB yang digunakan oleh responden-responden adalah tidak sah ab initio dan tidak boleh dikuatkuasakan (lihat perenggan 32(b)).

(2) Oleh kerana fakta yang relevan tidak dipertikaian adalah mencukupi

untuk menentukan persoalan yang dikemukakan oleh perayu-perayu, permohonan di bawah A 14A dan/atau A 33 KMT adalah sesuai dan wajar. Tiada keperluan untuk menjalani perbicaraan bagi mengemukakan keterangan lain sebagaimana diperintahkan oleh Mahkamah Tinggi (lihat perenggan 32(a) dan 21).

(3) Pada masa PJB dimasuki pada tahun 1993, Lazim bukan warganegara Malaysia. Dia hanya menjadi seorang warganegara dalam bulan Disember 2010. Oleh itu dia tidak boleh mendakwa dia seorang 'Melayu' bagi tujuan Enakmen Rizab Melayu. Dia tidak layak mendapat kewarganegaraan Melayu pada masa matan (lihat perenggan 23).

(4) Seksyen 2 Enakmen tersebut mentafsir 'Melayu' sebagai seorang yang berasal daripada mana-mana bangsa Melayu dan lazimnya bercakap bahasa Melayu atau mana-mana bahasa Melayu dan menganut agama Islam. Perkataan-perkataan 'bangsa Melayu' hendaklah merujuk kepada suatu bangsa di Malaysia (atau Malaya sebelum ini). Dalam erti kata lain, ia hendaklah merujuk kepada seorang warganegara kepada negara ini, tetapi bukan kepada seorang yang bukan warganegara (lihat peranggan 24).

(5) Perkara 160 kepada Perlembagaan Persekutuan mentafsirkan 'Melayu' sebagai seorang yang menganuti agama Islam, lazimnya bercakap dalam bahasa Melayu, mengamal adat Melayu dan (a) telah sebelum Hari Merdeka dilahirkan di Persekutuan atau di Singapura, atau pada hari tersebut bermastautin di Persekutuan atau di Singapura; atau (b) merupakan isu orang tersebut. Lazim, yang dilahirkan di Indonesia pada tahun 1946, tidak layak untuk keperluan kewarganegaraan sama ada di bawah perenggan (a) atau (b) definisi tersebut (lihat perenggan 25–26).

(6) Oleh kerana pembeli bukan Melayu tidak boleh memperoleh hak milik tanah rizab Melayu di bawah Enakmen tersebut, tidak boleh terdapat cara lain yang mana pembeli sedemikian boleh memperolehnya. Tempoh lama pendudukan dan penetapan di atas tanah tersebut oleh responden-responden tidak boleh membentuk kelayakan ke atas tanah tersebut. Untuk membenarkan pembeli memperoleh hak milik melalui cara lain yang bukan menurut Enakmen tersebut akan menjejaskan tujuan Enakmen tersebut yang mana tujuannya adalah untuk melindungi pemilikan Melayu ke atas tanah-tanah rizab Melayu tersebut (lihat perenggan 30–31).]

Notes

For cases on dealing contrary to Enactment, see 8(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3814–3816.

Cases referred to

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2008] 2 MLJ 812, CA (refd)

A *Haji Hamid bin Ariffin & Anor v Ahmad bin Mahmud* [1976] 2 MLJ 79, FC (refd)
Petroleum Nasional Bhd v Kerajaan Negeri Terengganu [2004] 1 MLJ 8, CA (refd)
Robert Lee @ Robert Seet & Anor v Wong Ah Yap & Anor [2007] 4 MLJ 393, FC
B (refd)

Legislation referred to

Federal Constitution arts 19(1)(a)(i), 160
Kedah Malay Reservation Enactment 1931 s 6(2)
C Malay Reservations Enactment (Cap 142) ss 2, 8(1), 19
National Land Code Form 5D
Rules of Court 2012 O 14A, O 33 rr 2, 5
Rules of the High Court 1980 O 14A, O 14A r 1(1), (2), O 33 rr 2, 5, O 89

D **Appeal from**: Originating Summons No 24–1115 of 2010 (High Court, Shah Alam)

Abdul Shukur Tokachil (Nor Nadiya Mohd Hafidz with him) (Shukor & Associates) for the appellants.
Mohd Hisham Md Nen (Zairus & Dora) for the respondents.
E

Ramly Ali JCA (delivering judgment of the court):

F THE APPEAL

[1] The present appeal before us is against the decision of the learned High Court judge dismissing the appellants'/plaintiffs' application under O 14A and/or O 33 rr 2 and 5 of the Rules of the High Court 1980 (now the Rules of
G Court 2012).

FACTUAL BACKGROUND

H **[2]** The appellants are the registered owners of the land held under title GM 820, Lot 1642, Mukim Kajang, Daerah Hulu Langat, Negeri Selangor Darul Ehsan, which is a Malay reserved land ('the said land').

[3] On 18 January 2009, the appellants discovered that the respondents were
I trespassing, occupying and staying on the said land without the consent of the appellants. The appellants then issued a notice dated 2 December 2009 for the respondents to vacate the said land. The respondents failed or refused to do so and subsequently on 14 May 2010 the appellants commenced an action at the Shah Alam High Court to remove the respondents from the said land.

[4] In their defence, the respondents (as the defendants at the High Court) contended that they are the lawful owners of the said land and averred that one Lazim bin Kanan (the named respondent/defendant) had entered into a sale and purchase agreement dated 16 December 1993 with the appellants' late father, one Ismail bin Duahat, who was at the material time the registered owner of the said land wherein the said Ismail bin Duahat had allegedly sold to the said Lazim bin Kanan part of the said land (where the respondents are now occupying) for a total consideration of RM5,000.

[5] It is not in dispute that the said land was and still is a Malay reserved land. ('Tanah Simpanan Melayu' — as appears in the relevant Form 5D of the *Geran Mukim*). It is also not in dispute the said Lazim bin Kanan (the purchaser of the said land) was born in Indonesia on 13 November 1946 and had entered Malaysia vide Entry Permit Number A61045. Only on 16 December 2010, was he conferred the status of citizen of Malaysia under art 19(1)(a)(i) of the Federal Constitution. In other words, when the said sale and purchase agreement in respect of the said land was signed between the appellants' late father, Ismail bin Duahat and the said Lazim bin Kanan on 16 December 1993, the said Lazim was not a citizen of Malaysia.

[6] The said sale and purchase agreement was dated 2 August 1993 (as appears in the preamble) but was only signed by the parties on 16 December 1993. The contents of the said sale and purchase agreement is reproduced below:

> PERJANJIAN JUAL TANAH
>
> BAHAWA satu perjanjian diperbuat pada hari ini bertarikh 2hb Ogos, 1993 di Kajang, Selangor Darul Ehsan di antara ISMAIL BIN DUAHAT -K.P. No: 0571805(B) dari alamat SRD 662/1, Kg Sg Ramal Dalam, 43000 Kajang, Selangor Darul Ehsan (Adalah sebagai pihak 'Penjual Tanah') dan di satu pihak ialah LAZIM BIN KANAN - K.P. No. 8441715(M) dari alamat Sg Ramal Dalam, 43000 Kajang, Selangor Darul Ehsan (Adalah sebagai pihak 'Pembeli Tanah') seperti mana perjanjian yang dinyatakan di bawah:
>
> BAHAWA penjual tanah memiliki tanah yang dikenali EMR: 5516 LOT: 1642 Mukim: Kajang, tanah tersebut terletak di Kg Sg Ramal Dim mengaku telah menjualkan tanah seluas 1 rantai sahaja kepada pembeli untuk mendirikan rumah kediaman bagi dapat pembeli dan keluarganya mendiami di atas tanah tersebut dengan harga sebanyak RM5,000.00.
>
> Dengan ini tanah yang disebutkan itu adalah menjadi hak pembeli dan tiada orang lain berhak untuk ganggu atau sebagainya seperti mana telah saya persetujui dengan pembeli.
>
> Pembeli dengan ini bersetuju dengan pengakuan dari penjual tanah itu dan dengan ini menyerahkan bayaran sebanyak RM5,000.00 secara tunai seperti mana dikehendaki oleh penjual.
>
> Dengan ini pembeli membina sebuah rumah untuk kediaman keluarganya.

Dengan ini kedua-dua pihak telah bersetuju dengan syarat-syarat di atas maka perjanjian ini ditandatangani oleh kedua-dua pihak berhadapan saksi-saksinya.

Ditandatangani oleh:	Ditandatangani oleh:
t.t.	t.t. 8441715
……..	……
(ISMAIL BIN DUAHAT)	(LAZIM BIN KANAN) 16/12/93
Disaksikan oleh:	Ditandatangani Oleh:
RAMLI B SIAMAT I/C 1212909	t.t.
t.t.	ABDUL JALAL AGIL
……..	……
	I/C 3007107

[7] The said sale and purchase agreement clearly indicates that the transaction was an outright sale of the said land from Ismail bin Duahat (as the vendor) to Lazim bin Kanan (as the purchaser) for a purchase price of RM5,000. By the said sale, the land was fully vested with the purchaser ('… tanah yang disebutkan itu adalah menjadi hak pembeli dan tiada orang lain berhak ganggu atau sebagainya …').

THE APPELLANTS' CLAIM

[8] On 14 May 2010 the appellants (as the plaintiffs at the court below) filed an action by way of originating summons under O 89 of the RHC 1980. On 17 October 2011 the court ordered that the matter be proceeded with as a writ and the affidavits were to be treated as pleadings. On 17 July 2012 the appellants (as the plaintiffs) filed an application under O 14A and/or O 33 rr 2 and 5 of the RHC 1980 and Rules of Court 2012 to determine the following preliminary issue:

> Whether the land held under title GM 820, Lot 1642, Mukim Kajang, Daerah Hulu Langat, Negeri Selangor Darul Ehsan ('the said Land') which is a Malay reserved land, can be sold to a non-citizen of Malaysia

FINDINGS OF THE JUDGE

[9] The learned High Court judge, had on 1 November 2012 adjudged that before the question posed in the application could be decided the following issues needed to be determined first:

(a) the validity of Ismail bin Duahat's signature, as the previous registered owner of the said land, on the impugned sale and purchase agreement;

(b) whether parties to the impugned sale and purchase agreement were aware that the said land was a Malay reserved land; and

(c) whether the respondent has equitable interest on the said land after paying RM5,000 to Ismail bin Duahat.

[10] The learned High Court judge in delivering her judgment made certain findings of facts, as follows:

(a) the respondents (the defendants) have proven that they were not trespassers on the said land;

(b) the respondents' occupation on the said land was made with the consent of the previous owner of the said land together with a consideration; and

(c) the impugned sale and purchase agreement existed.

[11] The learned High Court judge also found that the question posed by the appellants in the application would not resolve the appellants' claim on the said land. Therefore the said application was dismissed with costs. The appellants then filed a notice of appeal to the Court of Appeal. Hence the present appeal before us.

OUR FINDINGS

ORDERS 14A AND 33 R 2 OF THE RULES OF COURT 2012

[12] The relevant provision for consideration is O 14A of the RHC 1980 (now the Rules of Court 2012). Order 14A r 1(1)–(2) provides:

> 1 The Court may, upon the application of a party or of its own motion, determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that–
>
> (a) such question is suitable for determination without the full trial of the actions; and
>
> (b) such determination will finally determine the entire cause or matter or any claim or issue therein.
>
> 2 On such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.

[13] In a nutshell the order enables the court to determine any question of law or construction of document where it appears that such question is suitable for determination without the full trial of the action and such determination will finally determine the entire cause or matter or any claim or issue therein.

The purport of O 14A is that where it appears to any party that a question of law or construction is apparent on the pleadings and determination by the court will finally dispose of the matter this order can be invoked without the necessity of having to go for full trial. To go for full trial in cases of that nature would defeat the very reason for the creation of the order. Rule (2) of the order enables the court to summarily enter judgment, which would finally dispose of the matter. Real and serious attempt must be made to identify the material facts pleaded which are obviously undisputed or which should not have been disputed and then apply the relevant rules to the facts as found (see *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2008] 2 MLJ 812 (CA) and *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8 (CA).

[14] Alternatively, the same application can also be made under O 33 r 2 of the Rules of Court 2012. Under the said rule, the court may order any question or issue arising in any cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matters and the court may give directions as to the manner in which the question or issue shall be stated. As a general rule, the court will exercise its power under this rule if the trial of the question or issue will result in a substantial saving of time and expenditure which otherwise would have to be expended should the action go to trial. As a whole the outcome of the application will depend very much on the facts of each case. Under O 33 r 5, the court may give judgment and allow the plaintiff's claim; or dismiss the cause.

[15] In the present case, the appellants as the registered owners were claiming for vacant possession of the said land in question. The named respondent, Lazim bin Kanan in his defence, claimed that he was the rightful owner of the said land based on the sale and purchase agreement dated 16 December 1993 wherein the appellants' late father, Ismail bin Dauhat, who was at the material time the registered owner of the said land had allegedly sold the said land to the named respondent, Lazim bin Kanan. This fact is clearly pleaded in the statement of claim.

[16] An important and relevant issue of law had been framed and raised by the appellants ie whether the said land which is a Malay reserved land can be sold to a non-citizen of Malaysia. The question posed seeks to determine whether the sale transaction is valid under the relevant law ie the Malay Reservation Enactment (Chapter 142). If the answer is in the negative, the court may make a subsequent order to allow the appellants' claim, against the respondents. If the answer is in the affirmative, ie that the transaction is valid under the law, then the parties may proceed in the matter based on the position of the law determined by the court.

[17] The relevant facts necessary for determination of the issue posed by the appellants in their application under O 14A and/or O 33 r 2 of the Rules of Court 2012 are as follows:

(a) that the said land in question was at the material time, a Malay reserved land;

(b) that, even accepting the respondents' line of defence, the said land was sold to the named respondent, Lazim bin Kanan by the appellants' late father, Ismail bin Dauhat vide a sale and purchase agreement signed on 16 December 1993;

(c) that the sale was an outright sale where the property in the said land was vested in the said Lazim bin Kanan;

(d) that the said purchaser, Lazim bin Kanan at the time of the alleged sale transaction in 1993 was not a citizen of Malaysia; he was born on 13 November 1946 in Indonesia and that he entered Malaysia vide Entry Permit Number A 61045; and

(e) that the said Lazim bin Kanan was only conferred the status of a citizen of Malaysia under art 19(1)(a)(i) of the Federal Constitution on 16 December 2010.

[18] Section 8(1) of the Malay Reservation Enactment (Chapter 142) provides:

> Subject to the provisions of sub-section (ii) and of section 16 and 17 no Malay holding shall be transferred, charged, leased or otherwise disposed of to any person not being a Malay, and no memorandum of transfer charge or lease in contravention of this section shall be capable of registration in any Land office or Registry of Titles.

[19] Section 19 of the same Enactment provides that the effect of dealings contrary to the Enactment is void. The provision states:

> (i) All dealings or disposals whatsoever and all attempts to deal in or dispose of any Malay holding contrary to the provisions of this Enactment shall be null and void and no rent paid in pursuance of any such dealing disposal or attempts shall be recoverable in any Court.
>
> (ii) No action for breach of contract shall lie in respect of any dealing in or disposal of or any attempt to deal in or dispose of any Malay holding contrary to the provisions of this Enactment.

[20] On this point, the Federal Court had laid down the principle of law in a case where a Malay reserved land was sold by way of an outright sale, to a non-Malay, contrary to the relevant provisions of the Malay Reservation Enactment in the case of *Robert Lee @ Robert Seet & Anor v Wong Ah Yap & Anor*

[2007] 4 MLJ 393. Abdul Hamid Mohamad FCJ held that where land is subject to a relevant enactment or ordinance, the sale thereof to a person unqualified under the enactment or ordinance being a non-Malay is not valid. It was also held in that case, 'the argument that property in land can pass under an illegal and therefore unenforceable contract will defeat the whole purpose of the creation of customary lands and Malay reserved lands. It would amount to giving effect to a transaction clearly prohibited by law.'

[21] The effect of the question posed by the appellants in their application under O 14A is that if the sale and purchase of the said land from the late Ismail bin Duahad to Lazim bin Kanan in 1993, is contrary to the Malay Reservation Enactment (Chapter 142), then the sale is void and the sale and purchase agreement signed by the parties on 16 December 1993 cannot be enforceable in law. That being the case, the respondents' defence must fall and judgment can be entered in favour of the appellants (as the plaintiffs at the court below). In other words, the determination of the question posed by the appellants will dispose of the entire cause in the claim. Therefore, we are of the view that this is a fit and proper case to be summarily determined under O 14A and/or O 33 r 2 of the Rules of Court 2012. The disposal of the question posed will ultimately and definitely dispose the matter without the need to go to trial.

[22] Looking at the sale and purchase agreement between the parties, it is abundantly clear that the sale is an outright sale. It is provided in the agreement that 'Dengan ini tanah yang disebutkan itu adalah menjadi hak pembeli dan tiada orang lain berhak untuk ganggu dan sebagainya sepertimana yang telah saya persetujui dengan pembeli'. It is also stated that consideration of RM5,000.00 had been paid to the vendor and that 'pembeli membina sebuah rumah untuk kediaman keluarganya'.

[23] The prohibition on transfer to a non-Malay must be considered at the relevant time when the transaction took place ie when the sale and purchase agreement was entered into in 1993. At that time, the said Lazim bin Kanan was not a citizen of Malaysia (his status as a citizen of Malaysia was only conferred upon him on 16 December 2010). Therefore he cannot claim to be a Malay for the purpose of the Enactment. He was not eligible to be one at the material time.

[24] The prohibition under the Enactment (Chapter 142) is against any dealing of a Malay reserved land to any person not being a Malay. Section 2 of the same Enactment (Chapter 142) defines 'Malay' as a person belonging to any Malayan race who habitually speaks the Malay language or any Malayan language and professes the Moslem religion. The words 'Malayan race' must refer to a race in our country, Malaysia (or Malaya previously). In other words, it must refer to a citizen of the country, but not to a non-citizen.

[25] In this respect, the definition of the word 'Malay' in art 160 of the Federal Constitution can be a good guidance. In the article, 'Malay' means a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay custom and—

(a) was before Merdeka Day born in the Federation or in Singapore or born of parents one of whom was born in the Federation or in Singapore, or is on that day domiciled in the Federation or in Singapore; or

(b) is the issue of such a person.

[26] At the material time the said Lazim bin Kanan may be someone who habitually 'speaks the Malay language, professes the religion of Islam and conforms to Malay custom'. However, he did not qualify for the citizenship requirement either under para (a) or (b) of the definition — because he was born in Indonesia in 1946 (before Merdeka Day) and not in the Federation or in Singapore. There is also no evidence to show that he was 'born of parents one of whom was born in the Federation or in Singapore or is on that day domiciled in the Federation or in Singapore'.

[27] In his submissions before us, learned counsel for the respondents conceded that the said Lazim bin Kanan was not a Malay when the alleged sale transaction in respect of the said land took place in 1993. However, he submitted the respondents had been occupying and staying on the said land for a long period (since 1993) and therefore it is only fair and just that the respondents be given continued possession of the said land.

[28] In this respect, Abdul Hamid Mohamad FCJ in the Federal Court case of *Robert Lee @ Robert Seet & Anor* had given a sufficient answer in the following passage:

> It is true that the courts, through its decisions try to arrive 'fair and just' results. But it can only do so within the confines of the law, not through some general and vague sense of fairness and justice. Our British colonial masters saw it necessary to make laws to protect the ownership of a class of persons over some areas of land. Laws were thus enacted as a matter of policy. These laws are preserved by the Constitution. If at all these laws need to be amended or repealed, this should, as a matter of policy, be done by the legislature, not by the courts through their decisions.

[29] At para 58, p 407 of the above case, His Lordship continued:

> The decisions in the court below were based on what was perceived as fair and just. Here it was not just the issue of whether it would be more fair to decide in favour of the plaintiffs or the defendants. The court was faced with an illegal act by both of them, the result of which would cause at least one of them to suffer losses. The court

had to deal with the acts of two persons that contravened the written law and which, if given effect to, would defeat the whole purpose of the written law.

[30] Since a non-Malay purchaser cannot acquire title to a Malay reserved land under the Enactment, there cannot be any other way by which such a purchaser can acquire it. A long period of occupation and stay on the said land in question by the respondents cannot create any form of entitlement on the said land. To allow the purchaser to acquire title by any other mean not in accordance with the Enactment would defeat the purpose of the Enactment. On this issue, Abdul Hamid Mohamad FCJ in *Robert Lee @ Robert Seet & Anor case* had indicated that:

> The Ordinance was enacted for the protection of certain classes of people. Cases on Malay reserved lands were also to the same effect. The fact that the land had been occupied by the others for a length of time did not extinguish the landholders' title to the said lands.

[31] In another Federal Court case of *Haji Hamid bin Ariffin & Anor v Ahmad bin Mahmud* [1976] 2 MLJ 79, Suffian LP in dealing with the same provision in the Kedah Malay Reservation Enactment had ruled that by virtue of s 6(2) of the said Enactment the purported sale of the land, to a non-Malay was void ab initio and it could not be enforced by the purchaser. Every enactment must be looked at in the spirit in which it was enacted. In the case of the Malay Reservation Enactment, the aim was to safeguard Malay ownership of Malay reservation lands. To hold otherwise would be flying in the teeth of the clearest language used by the Legislature.

CONCLUSION

[32] Based on the above considerations, we are of the view that:

(a) the appellants' application under O 14A and/or O 33 r 2 of the Rules of the High Court 1980 (now the Rules of Court 2012) is an appropriate case to be determined summarily under the said orders. The relevant undisputed facts are sufficient to determine the question posed by the appellants. There is no necessity to go for trial to adduce other evidence as ordered by the learned judge;

(b) based on the undisputed relevant facts relating to the issue in question and the interpretation of the relevant laws and documents in the present case, the answer to the question posed by the appellants must be in the negative ie a Malay reserved land held under title GM 820, Lot 1642 Mukim Kajang, Daerah Hulu Langat, Negeri Selangor, Darul Ehsan cannot be sold to a non-Malay or non-citizen as elaborated above. The

said sale and purchase agreement relied upon by the respondents is void ab initio and therefore unenforceable; and

(c) we therefore allow the appeal with no order as to costs and enter judgment in favour of the appellants (the plaintiffs) as claimed. We also order that the deposit be refunded to the appellants.

Appeal allowed and judgment entered in favour of the appellants.

Reported by Ashok Kumar